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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 GREGORY A. FRANKLIN,
11 CDCR #E-66269,

12 Plaintiff,

13 vs.

14 L.E. SCRIBNER, D.W. BELL, G.J.
15 GIURBINO, R. MADDEN, T. OCHOA,
16 M.E. BOURLAND, E. TRUJILLO,
17 HALEY, R. NELSON, ORTIZ, VARGAS,
18 and GREENWOOD,

19 Defendants.

Civil No. 07-0438 BTM (LSP)

**ORDER DENYING PLAINTIFF'S
MOTION FOR TEMPORARY
RESTRAINING ORDER
WITHOUT PREJUDICE
[Doc. No. 39-1]**

20 **I. Procedural History**

21 Plaintiff, Gregory Franklin, a state prisoner currently incarcerated at Calipatria State
22 Prison located in Calipatria, California, and proceeding pro se, initially filed a Complaint
23 pursuant to 42 U.S.C. § 1983 on March 8, 2007 [Doc. No. 1]. On May 21, 2007, this Court
24 granted Plaintiff's Motion to Proceed *In Forma Pauperis* ("IFP") and directed the U.S. Marshal
25 to effect service of Plaintiff's Complaint pursuant to FED.R.CIV.P. 4(c)(2). *See* May 21, 2007
26 Order at 6-7. In addition, the Court denied Plaintiff's "Motion for Temporary Restraining
27 Order" because Plaintiff was unable to establish "either an imminent irreparable injury, or the
28 likelihood of success on the merits." *Id.* at 6. However, the Court permitted Plaintiff leave to

1 file a Motion for Preliminary Injunction once all named Defendants had been served with the
2 Complaint. *Id.*

3 **III. Plaintiff's Motion for Temporary Restraining Order ("TRO") [Doc. No. 39]**

4 Plaintiff has filed a request for "Amended Temporary Restraining Order and Preliminary
5 Hearing." [Doc. No. 39-1].

6 Rule 65 of the Federal Rules of Civil Procedure provides that:

7 A temporary restraining order may be granted without written or oral notice to the
8 adverse party or that party's attorney only if (1) it clearly appears from specific
9 facts shown by affidavit or by the verified complaint that immediate and
10 irreparable injury, loss, or damage will result to the applicant before the adverse
11 party or that party's attorney can be heard in opposition, and (2) the applicant's
12 attorney certifies to the court in writing the efforts, if any, which have been made
13 to give the notice and the reasons supporting the claim that notice should not be
14 required.

15 FED.R.CIV.P. 65(b).

16 First, the Court notes that Plaintiff has not submitted a sworn affidavit or declaration
17 certifying that any efforts have been made to give notice of his Motion to any named Defendant,
18 which is required by Federal Rule of Civil Procedure 65(b). As noted above, under Federal Rule
19 of Civil Procedure 65(b), a TRO may be granted without notice to the adverse party or that
20 party's attorney *only* if "it clearly appears from specific facts shown by affidavit or by the
21 verified complaint that immediate and irreparable injury, loss, or damage will result to the
22 applicant before the adverse party or that party's attorney can be heard in opposition."
23 FED.R.CIV.P. 65(b). Federal Rule of Civil Procedure 65(b) also requires the Plaintiff to certify
24 to the Court "the efforts, if any, which have been made to give the notice and the reasons
25 supporting the claim that notice should not be required." *Id.*

26 Plaintiff's Motion for TRO does not comply with this elemental procedural requirement
27 of Federal Rule of Civil Procedure 65(b). Moreover, Plaintiff has failed to show the likelihood
28 of success on the merits required to justify extraordinary injunctive relief. *Caribbean Marine
Services Co. v. Baldrige*, 844 F.2d 668, 674-75 (9th Cir. 1988). The Ninth Circuit recognizes
two tests for determining whether a district court should grant a preliminary injunction. Under
the traditional standard, a plaintiff must show: (1) a strong likelihood of success on the merits;

1 (2) a possibility of irreparable injury should the injunction not be granted; (3) that the balance
2 of hardships tips in his or her favor; and in some cases (4) that an injunction advances the public
3 interest. *See Save Our Sonoran, Inc. v. Flowers*, 381 F.3d 905, 911-12 (2004) (citing *Johnson*
4 *v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir.1995)). Alternatively, the plaintiff
5 may show “either a combination of probable success on the merits and the possibility of
6 irreparable injury or that serious questions are raised and the balance of hardships tips sharply
7 in his favor.” *Id.*

8 In his motion, Plaintiff claims that he was denied due process when he was charged with
9 a rules violation and he has been denied yard access seventy five (75) times from March, 2007
10 to August, 2007. Plaintiff asks this Court to issue a preliminary injunction as the “retaliatory
11 actions against him will escalate.” Pl.’s Mot. at 6-7.

12 With regard to the sporadic deprivation of outdoor exercise, Plaintiff has not alleged
13 sufficient facts to indicate that he would suffer imminent irreparable injury. “Whatever rights
14 one may lose at the prison gates, ... the full protections of the eighth amendment most certainly
15 remain in force. The whole point of the amendment is to protect persons convicted of crimes.”
16 *Spain v. Procunier*, 600 F.2d 189, 193-94 (9th Cir. 1979) (citation omitted). The Eighth
17 Amendment, however, is not a basis for broad prison reform. It requires neither that prisons be
18 comfortable nor that they provide every amenity that one might find desirable. *Rhodes v.*
19 *Chapman*, 452 U.S. 337, 347, 349 (1981); *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1981).

20 Plaintiff claims that he was denied outdoor exercise seventy five (75) times over a five
21 to six month time period. The Court finds that these allegations alone do not adequately
22 demonstrate that he would suffer imminent irreparable injury that would allow this Court to
23 grant relief before Defendants can be heard. Moreover, Plaintiff’s claims that his disciplinary
24 hearing following a rules violation report was a retaliatory act is more speculative at this stage
25 of the proceedings. Plaintiff simply does not adequately allege the threat of an injury that is
26 required to justify extraordinary injunctive relief. *Caribbean Marine Services Co. v. Baldridge*,
27 844 F.2d 668, 674-75 (9th Cir. 1988).

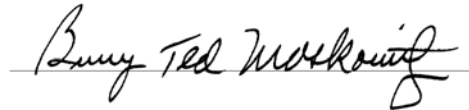
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1 **III. Conclusion and Order**

2 Based on the foregoing, the Court hereby **DENIES** Plaintiff's Motion for Temporary
3 Restraining Order and Preliminary Injunction pursuant to FED.R.CIV.P. 65 [Doc. No. 39-1].

4 **IT IS SO ORDERED.**

5 DATED: September 17, 2007

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7 Honorable Barry Ted Moskowitz
8 United States District Judge
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